The second ground raised by Mr. Cumarasamy is covered by Section 34 Penal Code which reads :—

> 34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

As to the third ground of appeal, I think there was sufficient evidence before the District Judge to find that the fans had been stolen from the store and that they were of same value.

With regard to the appeals of the 1st and 2nd Appellants against their convictions they will be dismissed.

As regards sentences I do not in any way consider the sentences excessive and the appeals against the sentences will also be dismissed.

Now the position of the 3rd Appellant, who was charged with "assisting in the disposal of the fans", Section 414 Penal Code, is entirely different. I have gone through the evidence of the prosecution on the record but I cannot find anything except perhaps suspicion against this Appellant, and I find that the learned District Judge has misdirected himself when he called upon the 3rd Appellant to enter upon his defence. His appeal will be allowed and the conviction and sentence quashed.

Appeal of First and Second Appellants Dismissed.
Appeal of Third Appellant Allowed.

THE MERCANTILE BANK OF INDIA (TRUSTEES) LTD. v. RUTH NICHOLAS.

[Orig. Civil Juris. (Bostock-Hill, J.) January 3, 1949]
[Penang — Civil Suit No. 129 of 1948]

Landlord and Tenant — Meaning of "Possession" — Possession by agent or licensee — Control of Rent Ordinance 1948 Ss. 2, 13 and 15(a).

The Plaintiffs in this case were the landlords of premises known as 7 Bangkok Lane, Penang. The Defendant is the sister of a Miss Sledge who became the tenant of the premises in 1941. In June 1947 Miss Sledge left for Borneo leaving the Defendant and her sisters living in the house. A Notice to Quit was duly served on Miss Sledge by registered post on the 25th May 1948. In this action the Plaintiffs claimed that the Defendant was a trespasser and asked for an injunction to restrain her from continuing to live on the said premises.

Held, that the tenant remained a statutory tenant, after the expiry of the Notice to Quit, as she was still "in possession" of the premises through her agent or licensee and that the defendant therefore was not a trespasser.

Cases referred to :—

(1) *Brown v. Draper* (1944) 1 K.B. 309.
(2) *Brown v. Brash and Ambrose* (1948) 2 K.B. 247.
(3) *Keeves v. Dean* (1924) 1 K.B. 685.
(4) *Skinner v. Geary* (1931) 2 K.B. 546.

CIVIL SUIT.

F. G. Pooley for the Plaintiffs.

Yeo Wee Pin for the Defendant.

Bostock Hill, J. : — The Plaintiffs in this case are the landlords of the house and premises known as No. 7, Bangkok Lane, Penang, and the Defendant is the sister of a Miss M. K. Sledge who became the tenant of the said premises in 1941.

The facts of the case are simple. Miss Sledge and the Defendant and two other sisters lived together in the said house from 1941 to 1947. The tenancy was arranged by Miss Sledge with the agent of the Plaintiffs and the rent receipts were given in the name of Miss Sledge though, apparently, the Defendant contributed towards the rent.

In about the middle of June, 1947, Miss Sledge left Penang for British North Borneo leaving the Defendant and her sisters still living in the house. Very soon after her arrival there Miss Sledge took up a post with a firm there and she has not been back since. Defendant continued to reside in the house and paid the rent in Miss Sledge's name i.e. the rent receipts continued to be given in Miss Sledge's name.

The Plaintiffs were not satisfied with this arrangement as they wanted the house and they attempted to serve Miss Sledge with a Notice to Quit in November, 1947, but it is not known that she ever received it. On 30th January, 1948 a Notice to Quit was handed to an adult inmate on the said premises and the Defendant stated that she heard of this but had not actually seen it. A third Notice to Quit, Exhibit P. 1. dated 29th April, 1948 was sent by A.R. registered post to Miss Sledge in Borneo and an acknowledgment, Exhibit P. 2, of that Notice to Quit signed by Miss Sledge as being received on 25th May, 1948 has been received. This Notice to Quit expired on 30th June, 1948.

Rent was paid by the Defendant in the name of Miss Sledge up to February, 1948 but after that, though tendered, it was refused by the Plaintiffs.

The Plaintiffs claim that the Defendant is a trespasser and ask for an injunction to restrain her from continuing to live on the said premises and also claim damages for trespass. The Defendant denies that she is a trespasser and claims that she has remained

on the said premises as the agent or licensee of the tenant.

The important point to be decided in the case is whether the tenant is still "in possession" of the said premises. Section 15(a) of the Control of Rent Ordinance, 1948 (No. 6/1948) defines a statutory tenant as "any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord."

If Miss Sledge must be held to be still "in possession" then she is clearly, since the expiry of the Notice to Quit on 30th June, 1948, a "statutory tenant" and is entitled to the protection of the Control of Rent Ordinance.

"Possession" under the Ordinance is not defined though its importance with regard to statutory tenancy is again emphasised in Section 16 of the Ordinance. It does not seem to be defined in the similar Acts in England though it appears to be used in the same sense as in the Control of Rent Ordinance, 1948. It is discussed at some length in the judgment of the Court of Appeal in *Brown v. Draper*[1]. In that case a husband (the tenant) had after a matrimonial dispute left the premises of which he was tenant. He did not give up possession to the landlord and he left his wife in occupation without taking any steps to revoke the licence which he had given her to continue living there, and he left the furniture in the house in her charge. The Plaintiffs in that case gave the husband a formal notice to quit expiring about one year after the husband left — a time almost exactly the same as the period that elapsed in the present case before the Notice to Quit was served on Miss Sledge. After that the husband ceased to pay rent. The Court of Appeal, reversing the decision of the learned County Court Judge who had found that the wife was simply a trespasser, held that the husband was still in possession of the house. The Court went on to say :—

> There are, we think, only 2 ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is, as we have stated, by giving up possession. The other is by an order against the tenant for the recovery of possession.

The facts in the present case are very much stronger than in the above cited case against the contention of the Plaintiffs that Miss Sledge has given up possession.

The only letter which the Plaintiffs have received from Miss Sledge is Exhibit P. 3. It is dated *19th March, 1948,* and in it she claimed still to be tenant and stated that she would be back very soon and still wanted her house.

Other letters written by Miss Sledge to her sister (the Defendant) were also put in.

In Exhibit D. 1, dated 2nd November, 1947, she stated that she would be back in a few months' time and she asked the Defendant to look after her things and furniture.

The Defendant in her Answers to Interrogatories stated that her sister Miss Sledge had entered into a contract of employment in Borneo for a period of 3 years starting about the middle of 1947. This is borne out by a passage in a letter Exhibit D. 4 from Miss Sledge to the Defendant and dated *23rd October,* 1948 in which she looks forward to seeing a friend in Borneo next year "at this time (i.e. October) or earlier."

Despite, therefore, occasional remarks in her letters about returning soon I find that she is intending to stay away about 3 years.

Mr. Pooley urged with a good deal of force that it cannot be held that she is still "in possession" through her agent or licensee (the Defendant) for so long a period.

But the Court of Appeal in England seem to have laid it down that a tenant who leaves an agent or licensee in possession or (probably) who leaves his furniture in the house can and does remain in possession as a statutory tenant unless he gives up possession to the landlord or revokes the licence. This seems to be the principle of the decisions in *Brown v. Draper* cited above and in a later case, *Brown v. Brash & Ambrose*[2]. In this latter case the Court of Appeal gave a very careful and reasoned judgment dealing with the question of possession by a "non-occupying" tenant. In the course of that judgment, at p. 254, the following passage occurs :—

> Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession of occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect: The legal result seems to us to be as follows:—
>
> (1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) In order to repel it he must at all events establish a de facto intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for five or ten years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts, as affirmed in Keeves v. Dean[3]

and **Skinner v. Geary**[4]. (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it; that is, instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming.

Another important passage in the judgment in *Brown v. Draper* cited above (at p. 315) is as follows :—

> The protection of the Acts, in our opinion, extends to protect a licensee of the tenant, not because the licensee can claim the protection of the Acts in his or her own right, but because the tenant is a necessary party to the proceedings, and no order can be made against his licensee in his absence.

Mr. Pooley, for the Plaintiffs, sought to distinguish our Control of Rent Ordinance from the English Acts on these points largely because of the special provision our Ordinance contains to give protection to the family of the tenant.

Section 13(1) of the Ordinance enacts that :—

> No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely:
>
> (The Ordinance then enumerates a number of cases (a) to (m) including (i), which reads:—)
>
> (i) where the tenant **or any member of his family** is not in occupation of the premises or any part thereof.

From the Definition in Section 2 of the Ordinance "member of his family" does not include "sister."

Mr. Pooley argued that by that sub-section (Section 13(1)(i)) a definite class of licensees has been given protection by the Ordinance and that the English cases cited above do not apply because there is no similar section in the English Acts. He went on to urge that other licensees were thereby excluded when considering what "possession" meant under Sections 15 and 16 of the Ordinance. I do not think his argument is sound. If it were, it would have the result, for example, of removing the protection of the Ordinance from a tenant who went away and left for even a reasonable time an agent or licensee not included in the definition of "member of his family" to look after and occupy his house during his absence. Once it has been conceded that possession can be retained on behalf of the tenant by his agent or licensee for a reasonable time, then the general principles outlined in the English cases cited above are applicable. It is to be observed, too, that Section 13(1) of the Ordinance merely sets out cases where judgment for the recovery of possession may be given; it does not purport to decide what amounts to possession by the tenant under Sections 15 and 16. It does not, in my opinion, introduce a new principle as to the determination of what possession by the tenant through an agent or licensee means.

It should also be observed that Sections 15 and 16 of our Ordinance contain provisions of a nature very similar to those contained in Section 15 of the English Increase of Rent and Mortgage Interest (Restriction) Act, 1920, and in the 2 English cases cited above the Courts must, I think, be deemed to have had the provisions of that Section in mind.

Hence I come to the conclusion that Miss Sledge is a statutory tenant because she is still "in possession" of the premises through her agent or licensee (the Defendant). That being the case the Defendant is not a trespasser and to obtain possession the Plaintiffs must make the tenant Miss Sledge a party as was held in *Brown v. Draper* cited above, where in similar circumstances the Court held categorically that the tenant was a necessary party to the proceedings.

Mr. Pooley then said that if the Court held that the tenant was a necessary party he applied to join the tenant Miss Sledge as a defendant in this action under Order 16 rule 11.

I do not think that that should be done because, if (as I have held) Miss Sledge is still the tenant (i.e. a statutory tenant), she is entitled to the protection given to statutory tenants by the Control of Rent Ordinance, 1948. That being so it would appear to be necessary for the Plaintiffs to obtain the permission of the Rent Board before applying to the Court for an order for possession.

For the reasons given above I hold that the Defendant is not a trespasser and that this action against her fails.

The Defendant was given leave to defend *in forma pauperis* and the Plaintiffs must pay such costs as she is entitled to under Order 16 rule 25(1).

I therefore give judgment for the Defendant with costs to be taxed under the above rule.

Judgment for Defendant.

CHAN SIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Callow, J. and Spenser-Wilkinson, J.) January 13, 1949]

[F.M. — Criminal Appeal No. 156 of 1948]

Emergency Regulations, Regulation 4(1)(a) — Carrying component parts of a sten gun — Evidence of identification parade — Conviction set aside as